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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204861
Party	Defendant Jean Pierre Biane
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

RED BULL GMBH,)	
)	
Opposer,)	Consolidated Opposition No. 91204861
)	Opposition No. 91204861 (Parent Case)
v.)	Opposition No. 91210860
)	
JEAN PIERRE BIANE,)	Marks:
)	
)	ANDALE! ENERGY DRINK & Design
Applicant.)	(Serial No. 85/334,836
)	
)	ANDALE! (Serial No. 85/646,359)
)	ANDALE! (Serial No. 85/646,316)
)	

APPLICANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Applicant submits the following Reply brief in support of its Motion for Summary Judgment ("Motion"). Opposer's Opposition to Applicant's Motion ("Response") is filled with argument but fails to cite a single fact which could create a genuine dispute sufficient to deny the Motion. Further, the Response is filled with irrelevant argument and purported facts which have nothing to do with the limited issue before the Board -- whether the marks at issue are sufficiently similar to cause a likelihood of confusion. For the additional reasons set forth below, the Board should grant Applicant's Motion and dismiss the opposition with prejudice.

Opposer's Response Does Not Raise a Single Genuine Dispute of Fact

Initially, Opposer misunderstands the difference between creating a genuine dispute of material fact, which precludes summary judgment, and merely contradicting legal conclusions asserted by the Applicant, which does not preclude summary judgment. While Opposer has attempted to contradict legal conclusions asserted in the Declaration of Jean P. Biane—e.g., that the marks are dissimilar—by arguing that they are "similar", these arguments do not create a

genuine material dispute of fact. The Board is fully capable of reaching its own conclusion on the sole issue raised in the Motion—whether the marks are sufficiently similar to cause a likelihood of confusion—by viewing the marks and comparing them for similarities or dissimilarities in appearance, sound, meaning, and commercial impression. The Board has resolved other cases in this manner and may do so here. See *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998)(court affirms Board dismissal of opposition based on dissimilarity of the marks CRISTAL and CRYSTAL CREEK); See *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991)(court affirms Board dismissal of opposition based on dissimilarity of the marks FROOTEE ICE and elephant design and FRUIT LOOPS); *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 9 USPQ2d 1736 (Fed. Cir. 1989)(court affirms Board dismissal of opposition based on dissimilarity of the marks PECAN SANDIES and PECAN SHORTEES); *Missiontrek Ltd. Co. v. Onfolio, Inc.*, 80 USPQ2d 1381 (TTAB 2005)(dissimilarity of the marks ONFOLIO and design and CARTAGIO dispositive) and *Sears Mortgage Corp. v. Northeast Savings F.A.*, 24 USPQ2d 1227 (TTAB 1992)(dissimilarity between the marks APPROVAL PLUS and APPROVALFIRST dispositive).

Opposer next argues that there is a genuine dispute of material fact because Applicant "mischaracterizes" Opposer's Mark as containing "trapezoids" and as appearing like a "windmill". Motion at 7. However, Applicant's "characterizations" are both correct and undisputed. First, Opposer's own submitted definition of "trapezoid" supports Applicant's argument that Opposer's mark contains trapezoids while Applicant's mark does not. A simple viewing of the marks confirms that Opposer's mark indeed consists of "four quadrilaterals which have only two parallel sides", which is consistent with the "trapezoid" definition of record. Second, the overall

arrangement of the four trapezoids in Opposer's mark does look like a "windmill"; and in any event, Opposer cannot dispute that Applicant believes this is the case.

Most importantly, the appearances of the marks are self-evident, and the Board is fully capable of accepting or rejecting the parties' characterizations of the marks. Opposer's suggestion that the Board is somehow incapable of determining whether the marks are similar is totally inconsistent with the Board's practice of disposing of cases on summary judgment in this manner when appropriate. See, e.g., *Kellogg Co. v. Pack'em*, supra. Accordingly, Opposer's Response contains mere argument that the marks are "similar" but does not raise a single genuine dispute of material fact that would preclude the Board from finding that the marks are not similar.

Applicant's Motion is Supported By Evidence

Opposer argues that the Motion is somehow deficient because Applicant submitted only a single declaration "providing only his personal opinion and without any accompanying exhibits or admissible evidence."¹ Response at 3. Opposer is wrong. The MSJ is supported by the Declaration of Jean P. Biane, which consists of his opinion that the marks are dissimilar based on his own personal knowledge. No "foundation" is required as a prerequisite for admissibility of Mr. Biane's personal opinions regarding the dissimilarity of the marks. Nor should the Board accept Opposer's contention that Applicant's opinion is somehow inadmissible because it is "biased". Testimony is frequently biased but still admissible. The weight to be assigned to the declaration is a matter of the Board's discretion, although Applicant submits that the Board should accept Applicant's analysis of the marks because it is accurate and consistent with the legal authorities cited in the Motion. Accordingly, Applicant's Motion is sufficiently supported by evidence.

¹ Opposer argues in the alternative that Applicant's Motion should be treated as a motion for judgment on the pleadings. Response at 4. Even if the Board treats Applicant's Motion as a motion for judgment on the pleadings, the Board may review the pleadings, compare the marks, and conclude that Applicant is entitled to judgment on the grounds that there is no genuine dispute of material fact and the marks are not similar. In this scenario, the Board need

The Word Portion ANDALE! is Dominant

Turning to a substantive comparison of the marks, Opposer argues that the background design portions of the marks at issue should be treated as "dominant" over the word portion ANDALE!. However, the word portion of a mark is generally considered dominant. See *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82, 218 U.S.P.Q. (BNA) 198 (Fed. Cir. 1983) ("[I]n a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed"); see also *Herko Intern., Inc. v. Kappa Books, Inc.*, 308 F. 3d 1156, 1165, 64 U.S.P.Q.2D (BNA) 1375 (Fed. Cir. 2002) ("The words dominate the design feature"). Opposer also boldly argues that "the sounds of the marks is not relevant in this proceeding", Response at 10, despite the obvious inclusion of the dominant and distinctive term ANDALE! at the top center of Applicant's mark. The word ANDALE! clearly has a sound, and consumers will pronounce the mark aloud when calling for Applicant's product by name.

Next, Opposer's discussion of *Arnold Schwinn & Co. v. Evans Prods. Co.*, 49 CCPA 1113, 133 U.S.P.Q. (BNA) 548 (CCPA 1962) (holding no likelihood of confusion despite the parties' use of very similar background designs, and the senior user's long time use and extensive advertising of its design for nearly forty years) actually supports Applicant's position. Like Schwinn, here the parties disagree as to whether the background designs are similar enough to cause a likelihood of confusion, but the words make all the difference between the marks. Applicant's mark contains ANDALE! as the dominant word portion of the mark, and the only dispute is over whether the mere background patterns are similar. Under Schwinn, similarities in background design are unlikely to cause confusion where the word portions of the marks serve to distinguish source. See *id.* at 1116 ("the designs serve primarily as the background for display of the words"). Thus, even

if the Board finds that Applicant's and Opposer's mere background designs are similar, confusion is not likely because the designs serve primarily as a backdrop for the display of dissimilar words (ANDALE! and RED BULL, respectively). Id.

Opposer believes Schwinn is distinguishable because the case involved bicycles, which Opposer argues "are usually bought by name" while suggesting that beverages are not. See Response at 7-8 ("a typical consumer is likely to make only a quick stop to purchase an energy drink, and, upon seeing a variety of products from afar and behind a glass refrigerator door -- such as how a consumer would view them when entering the store -- will be unable to identify any particular words on the products.")(emphasis added). Opposer's argument that consumers do not purchase beverages by name is wholly unsupported by evidence and defies common sense. Beverage consumers call for products by name just like in any other context, and Opposer has not submitted any legal authority or evidence to the contrary. Nor did the Schwinn court limit its holding to the bicycle industry, and the Board should not indulge Opposer's suggestion that Schwinn does not apply in the beverage context. Accordingly, consumers will recognize Applicant's dominant and distinctive ANDALE! mark when placed alongside other products and will distinguish Applicant's and Opposer's products by name.

Opposer's Ownership of a Soccer Team is Irrelevant

Opposer inexplicably argues that confusion is likely to result from concurrent use and registration of the marks at issue because "Opposer is well-known in the field of soccer in the United States" as the owner of the "New York Red Bulls", an alleged soccer team which sometimes uses a soccer ball as part of its soccer team logo.² Response at 9. This is a red herring.

² Opposer filed a "Declaration of Jennifer A. Powers" in support of various "facts" which have no bearing on the limited issue before the Board. In addition to being irrelevant, the declaration should not be considered because it was filed 10 days late. The opposition papers were due on October 11, 2013. The declaration was filed on October 21, 2013, ten days late.

Opposer's dubious allegation of confusion arising from concurrent use of a "soccer ball" by Applicant and a third party soccer team is not before the Board. The only question before the Board is whether the marks at issue are sufficiently similar to cause a likelihood of confusion.

The marks are not similar because Applicant's mark contains the dominant and distinctive wording ANDALE!, and the parties' respective background designs are different. When the marks are considered in their entireties, and when the dominant and distinctive portions are afforded the proper weight in the analysis, there is no likelihood of confusion as a matter of law. Opposer's conclusory allegations of a likelihood of confusion are not enough to survive summary judgment. See Int'l Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr., 103 F.3d 196, 200 (1st Cir. 1996) (affirming district court's grant of summary judgment where there was no issue of fact respecting likelihood of confusion and noting, "[to] demonstrate likelihood of confusion a markholder (or one claiming by, through, or under her) must show more than the theoretical possibility of confusion."). The Notice of Opposition should be dismissed with prejudice.³

Conclusion

Accordingly, Applicant's Motion for Summary Judgment should be granted, and the opposition should be dismissed with prejudice.

Date: October 31, 2013

Respectfully submitted,

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³ Although Applicant did not specifically request dismissal of the Section 2(a) claim, the Board would be well-justified in disposing of this claim on the same grounds as the Section 2(d) claim -- i.e., the marks are not similar.

PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **APPLICANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** has been served on Martin R. Greenstein, counsel for Opposer, on October 31, 2013, via First Class U.S. Mail, postage prepaid to:

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By: /Paulo A. de Almeida/
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